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12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 Cathy Sandoval Garcia

15 Plaintiff,

16 v.

17 Solomon, Grindle, Silverman &
18 Wintringer APC, and Cabrillo
19 Credit Union

20 Defendant.

21 **Case No.: 3:11-cv-1805 DMS(BLM)**

22 **[CLASS ACTION]**

23 **Opposition To Defendant's Motion
Under Fed. R. Civ. P. 12(b)(1) and
(6) and 12(f)(1), and a Request for
the Court to Convert the Motion to
a Motion for Summary Judgment**

24 **Date: January 13, 2012**

25 **Time: 1:30 PM**

26 **Courtroom: 10**

27 **Judge: Hon. Dana M. Sabraw**

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1 **I. INTRODUCTION**

2 Defendant Solomon, Grindle, Silverman & Wintringer APC (Solomon), is a
 3 debt collection law firm.¹ Cabrillo Credit Union (Cabrillo) is an original creditor²
 4 and one of Solomon's clients.³ In April of 2011, at the behest of Cabrillo, Solomon
 5 began collecting a debt from Plaintiff Cathy Garcia (Garcia) that Cabrillo claimed
 6 was owed to Cabrillo.⁴ Solomon did this by mailing a collection letter to Garcia.⁵

7 Solomon's April 4, 2011 letter⁶ violated the Fair Debt Collection Practices
 8 Act, 15 U.S.C. §§ 1692 et seq. ("FDCPA") and the Rosenthal Fair Debt Collection
 9 Practices Act, California Civil Code §§ 1788-1788.32 ("Rosenthal Act").⁷

10 Subsequently, Plaintiff filed a Complaint on August 11, 2011,⁸ as well a First
 11 Amended Complaint on October 12, 2011,⁹ for these violations of state and federal
 12 law. Defendants responded with a motion to dismiss,¹⁰ which Plaintiff opposes.

13 **II. SUMMARY OF THE ARGUMENT**

14 Seeking to somewhat level the playing field between debtors and debt
 15 collectors, the FDCPA prohibits debt collectors "from making false or misleading
 16 representations and from engaging in various abusive and unfair practices." *Heintz*
 17 *v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). The
 18 FDCPA is a strict liability statute that "makes debt collectors liable for violations

19 ¹ Docket No. 4, First Amended Complaint at ¶ 15.

20 ² Id. at ¶ 19.

21 ³ Id. at ¶ 23-24, & 36.

22 ⁴ Id. at ¶ 24.

23 ⁵ Id.

24 ⁶ See Exhibit A of the First Amended Complaint, Docket No. 4.

25 ⁷ Docket No. 4, First Amended Complaint at ¶¶ 30-31; 15 U.S.C. § 1692g.

26 ⁸ Docket No. 1.

27 ⁹ Docket No. 4, First Amended Complaint.

28 ¹⁰ Docket No. 7.

1 that are not knowing or intentional." *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d
 2 1002, 1005 (9th Cir. 2008). California's Rosenthal Act is a state version of the
 3 FDCPA which incorporates the language of the FDCPA with some expansion of
 4 certain rights.¹¹ *Sial v. Unifund CCR Partners*, 2008 U.S. Dist. LEXIS 66666 (S.D.
 5 Cal. Aug. 28, 2008)(“The Rosenthal Act establishes liability under California law
 6 for violations of the FDCPA.”). The issues here are as follows:

- 7 (i) Defendants introduced extrinsic evidence, which Plaintiff does not
 8 oppose, therefore Plaintiff urges the Court to treat this motion and its
 9 responses as a motion for partial for summary judgment.
- 10 (ii) Solomon's April 4, 2011 letter violated the FDCPA and California's
 11 Rosenthal Act, and judgment should therefore be entered in favor of
 12 Plaintiff as a matter of law.
- 13 (iii) Defendants violations cannot be cured and have not been cured.
- 14 (iv) Cabrillo is vicariously liable for any violations of the FDCPA by
 15 Solomon

16 III. LEGAL STANDARDS

17 A. FED. R. CIV. P. 12

18 A motion under Fed. R. Civ. P. 12(b)(6) is generally disfavored as it is not a
 19 procedure for resolving a contest about the facts or merits of the case *Neilson v.*
 20 *Union Bank of Cal.*, N.A. 290 F Supp2d 1101, 1151, (CD Cal 2003). Dismissal for
 21 failure to state a claim is appropriate only when the plaintiff can prove no set of
 22 facts supporting relief. *Guerrero v. Gate* 357 F3d 911, 916 (9th Cir 2004).
 23 Accordingly, the motion is viewed with disfavor and is rarely granted. *Gilligan v.*
 24 *Jamco Dev. Corp.* 108 F3d 246, 249 (9th Cir 1997); *Gallardo v. DiCarlo* 203 F
 25 Supp2d 1160, 1164-1165 (CD Cal 2002).

27 ¹¹ For example, and of interest here, California's Rosenthal Act provides that creditors are debt
 28 collectors as well. See Cal. Civ. Code § 1788.2(c). The FDCPA generally excludes original
 creditors, although there are exceptions to this. See 15 U.S.C. § 1692a(6).

1 Further, because Rule 12 motions are rarely granted, they are particularly
 2 troublesome in consumer rights actions where the Court must grant reasonable
 3 attorneys' fees and costs to prevailing plaintiffs. *McGowan v. King, Inc.* 661 F.2d
 4 48, 51 (5th Cir. 1981) (When a defendant protracts consumer rights litigation
 5 through a stalwart defense, it is the defendant that must bear the cost for plaintiff's
 6 counsel's efforts.)

7 A complaint must be dismissed if it does not plead "enough facts to state a
 8 claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 US
 9 544, 127 S Ct 1955, 167 L Ed 2d 929, 949 (2007). In other words, the factual
 10 allegations in the complaint "must be enough to raise a right to relief above the
 11 speculative level." *Id.*, at 940. While the complaint need not contain detailed
 12 factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitle
 13 [ment] to relief requires more than labels and conclusions, and a formulaic
 14 recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v.*
 15 *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing
 16 *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)).

17 **B. EXTRINSIC EVIDENCE**

18 Defendants have submitted exhibits with their motion. As a general rule, a
 19 district court may not consider any material beyond the pleadings in ruling on a
 20 motion to dismiss under Fed R Civ P 12(b)(6). *Lee v. City of Los Angeles*, 250 F3d
 21 668, 688, (9th Cir 2001). Thus, if the Court considers matters outside the
 22 pleadings, it must treat the motion as one for summary judgment. The pleadings
 23 include any properly submitted attachments. *Wan v. Commercial Recovery Sys.,*
 24 *Inc.* 369 F Supp. 2d 1158, 1161, (N.D. Cal 2005).

25 Plaintiff urges the Court to exercise its discretion under Rule 12 and convert
 26 this motion to a partial motion for summary judgment. When both parties present
 27 affidavits and other material outside of the pleadings, in support of and in
 28 opposition to, the motion must be treated as one for summary judgment under Rule

1 56 if those materials are considered by the Court. *Swedberg v. Marotzke*, 339 F.3d
 2 1139, 1143-44 (9th Cir. 2003). The Court should take the facts as established by
 3 the evidence to the extent that they are undisputed, and in favor of the non-moving
 4 party, Plaintiff, to the extent material facts are genuinely in dispute.

5 In a motion for summary judgment, the evidence of the opposing party is to
 6 be believed, and all reasonable inferences that may be drawn from the facts placed
 7 before the court must be drawn in favor of the opposing party. *See Anderson v.*
 8 *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986);
 9 *Stegall v. Citadel Broad, Inc.*, 350 F.3d 1061, 1065 (9th Cir. 2003). “Credibility
 10 determinations, the weighing of the evidence, and the drawing of legitimate
 11 inferences from the facts are jury functions, not those of a judge, [when] he [or she]
 12 is ruling on a motion for summary judgment.” *United States of America v.*
 13 \$39,490.00, 2002 WL 32690813 (S.D. Cal. 2002); *Anderson*, 477 U.S. at 255, 106
 14 S. Ct. at 2513.

15 **IV. ARGUMENT**

16 **A. CABRILLO CREDIT UNION IS VICARIOUSLY LIABLE FOR ANY VIOLATIONS**
 17 **OF THE FDCPA BY ITS ATTORNEYS, SOLOMON, GRINDLE, SILVERMAN &**
 18 **WINTRINGER APC.**

19 The Supreme Court has long held that when attorneys are engaged in debt
 20 collection activities, their activities are regulated by the FDCPA. *Jerman v.*
 21 *Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1618 (U.S. 2010),
 22 (“We held in that case that the FDCPA’s definition of “debt collector” includes
 23 lawyers who regularly, through litigation, attempt to collect consumer debts.”), citing
 24 *Heintz v. Jenkins*, 514 U.S. 291, 292, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995).

25 In *Fox v. Citicorp Credit Servs.*, 15 F.3d 1507 (9th Cir. 1994), Ninth Circuit
 26 also held that a client of an attorney that is collecting a debt for that client is
 27 vicariously liable for the actions of its attorneys. Other circuit courts have held
 28 similarly, with no circuit court ever holding to the contrary.

1 Looking to the plain language of the FDCPA, the Ninth Circuit in *Fox* held
 2 that the actions of a law firm that engages in debt collection are imputed to the
 3 client on whose behalf those actions are being taken. “In order to give reasonable
 4 effect to [the FDCPA], we must conclude that Congress intended the actions of an
 5 attorney to be imputed to the client on whose behalf they are taken.” *Fox*, at 1516,
 6 holding that the *original creditor* in that case, Citicorp, was vicariously liable for
 7 the debt collection actions of its attorneys. See *Clark v. Capital Credit &*
 8 *Collection Servs.*, 460 F.3d 1162 (9th Cir. 2006) (“...we have recognized vicarious
 9 liability under the FDCPA, see *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507,
 10 1516 (9th Cir. 1994) (holding that “Congress intended the actions of an attorney to
 11 be imputed to the client on whose behalf they are taken”)).

12 Contrary to Defendant’s claim, the Ninth Circuit has never held that this
 13 vicariously liability only takes place when the client is itself a debt collector under
 14 the FDCPA. In fact, just the opposite is true. In *Fox*, the client of the debt
 15 collector, an original creditor, was found to be vicariously liable even though
 16 Citicorp was the original creditor¹² and *not* a debt collector under the FDCPA. In
 17 *Fox* the Ninth Circuit held that the client of a law firm is vicariously liable for the
 18 actions of the attorneys. (“[W]e must conclude that Congress intended the actions
 19 of an attorney to be imputed to the client on whose behalf they are taken.”) *Id.*, 15
 20 F.3d at 1516.

21 Finally, the Supreme Court recently embraced the Ninth Circuit’s position on
 22 vicariously liability in *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*,
 23 130 S. Ct. 1605, 1622 (U.S. 2010) (“Moreover, a lawyer’s interest in avoiding
 24 FDCPA liability may not always be adverse to her client. Some courts have held
 25 clients vicariously liable for their lawyers’ violations of the FDCPA. See, e.g., *Fox*
 26

27 ¹² See *Maguire v. Citicorp Retail Servs.*, 147 F.3d 232, 235 (2d Cir. Conn. 1998), holding that
 28 Citicorp is a creditor for the purposes of the FDCPA, exactly like Carillo Credit Union is, here.

1 v. *Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1516 (CA9 1994); see also *First*
 2 *Interstate Bank, N.A. v. Soucie*, 924 P.2d 1200, 1202 (Colo. App. 1996).”).

3 Consequently, a client of an attorney who is doing debt collection for that
 4 client is vicariously liable for the attorney’s conduct under the FDCPA for that
 5 activity pursuant to the Ninth Circuit in *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d
 6 1507, 1516 (9th Cir. 1994).

7 **B. CABRILLO CREDIT UNION IS ALSO A DEBT COLLECTOR UNDER**
 8 **CALIFORNIA’S ROSENTHAL ACT.**

9 Additionally, Cabrillo Credit Union, as an original creditor, is a debt collector
 10 under California’s Rosenthal Act, so even if only debt collectors are vicariously
 11 liable for its agents, as Cabrillo argues, Cabrillo Credit Union would *still* be
 12 vicariously liable under California law as Cabrillo is a debt collector. *McGrew v.*
 13 *Countrywide Home Loans, Inc.*, 628 F. Supp. 2d 1237 (S.D. Cal. 2009) (“Under
 14 [the Rosenthal Act’s] definition, and unlike the federal Fair Debt Collection
 15 Practices Act (FDCPA), “debt collector” includes creditors and mortgage
 16 servicers.”) *Id.*, at 1242. See also, *Thomas v. Americredit Fin. Corp.*, 2007 U.S.
 17 Dist. LEXIS 70192 (N.D. Cal. Sept. 11, 2007) (Unlike the FDCPA, California’s
 18 Rosenthal Act provides that original creditors are debt collectors.) Consequently,
 19 even if the Court were to accept the argument by Defendants that there is a
 20 requirement that an original creditor has to be a debt collector before being held to
 21 be vicariously liable, as Cabrillo tries to argue, Cabrillo is clearly a debt collector.

22 **C. IT IS BEYOND ANY REASONABLE DISPUTE THAT DEFENDANT HAS**
 23 **VIOLATED THE FDCPA, AND JUDGMENT SHOULD THEREFORE BE**
 24 **ENTERED IN FAVOR OF PLAINTIFF.**

25 Defendants’ April 4, 2011 letter attached as Exhibit “A” to Plaintiff’s First
 26 Amended Complaint, has several violations of the FDCPA. Plaintiff maintains
 27 Defendants’ letter contains many different violations of the FDCPA. However, only
 28 one violation is needed to create liability under the FDCPA and Plaintiff hereby

1 requests partial summary judgment on the clearest and factually uncontested
 2 violations.¹³ *O'Connor v. Check Rite*, 973 F. Supp. 1010, 1020 (D. Colo. 1997)
 3 (“Since the FDCPA is a strict liability statute, a plaintiff need only show one
 4 violation of its provisions to be entitled to summary judgment. [Citations.]”);
 5 *Hartman v. Meridian Fin. Servs., Inc.*, 191 F. Supp. 2d 1031, 1046 (W.D. Wis.
 6 2002) (“Because the FDCPA is a strict liability statute, proof of one violation is
 7 sufficient to support summary judgment for plaintiffs on their federal claim. *Bartlett*
 8 *v. Heibl*, 128 F.3d 497, 499 (7th Cir. 1997).”)

9 **Violation 1: Defendant illegally misstated the time period Plaintiff had to
 10 dispute the debt, in violation of 15 U.S.C. § 1692g and Cal. Civ. Code §
 11 1788.17.**

12 Twice in Defendants’ initial communication with Plaintiff, Defendants
 13 misstate Plaintiff’s time period to dispute the debt, stating, “within 30 days **from**
 14 **the date of this letter...**”¹⁴ (emphasis added) instead of providing the requisite
 15 “within 30 days of **receipt of the notice.**” (emphasis added). By mailing notices
 16 stating that debtors have thirty days from the date of the letter to challenge the debt,
 17 Defendants led debtors to believe that they had less than thirty days to obtain
 18 verification of the debt. This language overshadowed, weakened, and failed to
 19 comply with, the notice required by 15 U.S.C. § 1692g(a), as well as Cal. Civ. Code
 20 1788.17 as it incorporates 15 U.S.C. § 1692g(a), because it attempted to limit the
 21 rights available to Plaintiff in a manner that creates a contradiction would confuse
 22 the least sophisticated consumer into disregarding his or her rights pursuant to the
 23 validation notice required in 15 U.S.C. § 1692g and Cal. Civ. Code § 1788.17.

24
 25
 26 ¹³ If Defendant is found liable under either Violation 1 or Violation 2, Plaintiff will not pursue
 27 liability for her remaining claims.

28 ¹⁴ See Defendant’s April 4, 2011 letter ¶¶ 3 & 7, attached as Plaintiff’s Exhibit “A”.

1 Federal courts have found this to be a violation:

2 By mailing notices stating that debtors have thirty days from
 3 the date of the letter to challenge the debt, Defendant led
 4 debtors to believe that they had less than thirty days to obtain
 5 verification of the debt. That is a clear violation of the statute,
 6 as the court concluded in *Cavallaro* involving a FDCPA claim
 7 against a law firm that sent out notices that very similarly
 8 misstated the time the debtor had to respond and dispute the
 9 debt.

10 *Rivera v. Amalgamated Debt Collection Servs.*, 462 F. Supp. 2d 1223, 1228 (S.D.
 11 Fla. 2006), citing *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F. Supp.
 12 1148, 1154 (E.D.N.Y 1996). In *Cavallaro*, the debt collector included a notice that
 13 stated, “Unless you, within thirty (30) days from the date of this notice, dispute the
 14 validity of the debt, or any portion thereof, the debt will be assumed to be valid by
 15 this office.” This is the same language that exists here, and the court in *Cavallaro*
 16 found this language violated the FDCPA.

17 “By specifying that the debt must be disputed within thirty days from the
 18 date of receipt of the notice, Congress has consciously protected against abusive
 19 tactics of debt collectors, such as the backdating of notices or other practices that
 20 might shorten debtors time to respond. Although only a small minority of debt
 21 collectors may engage in such tactics, courts cannot discriminate in identifying
 22 violators of § 1692g(a)(3) when faced with a strict liability statute that proscribes
 23 specific acts regardless of intent.” *Cavallaro v. Law Office of Shapiro & Kreisman*,
 24 933 F. Supp. 1148, 1154 (E.D.N.Y. 1996).

25 Defendants’ statements that Plaintiff has “30 days from the *date of the letter*”
 26 rather than 30 days of *receipt of the notice* is a clear violation of 15 U.S.C. § 1692g
 27 (a)(3). Courts have routinely found this exact language to be a violation of the
 28 FDCPA. See *Cavallaro v. Law Office of Shapiro & Kreisman*, 933 F. Supp. 1148,
 1154 (E.D.N.Y., 1996); *Spears v. Brennan*, 745 N.E.2d 862 (ind. App., 2001);
 13 *Rivera v. Amalgamated Debt Collection Services*, 462 F.Supp.2d 1223 (S.D. Fla.,

1 2006); *Turner v. Shenandoah Legal Group, P.C.*, 2006 WL 1685698 (E.D. Va. June
 2 12, 2006); *Gervais v. Riddle & Assoc., P.C.*, 363 F. Supp. 2d 345 (D. Conn. 2005);
 3 *Bishop v. Global Payments Check Recovery Servs., Inc.*, 2003 WL 21497513 (D.
 4 Minn. June 25, 2003), and *Swift v. Maximus, Inc.*, 2004 U.S. Dist. LEXIS 13190
 5 (E.D.N.Y. July 15, 2004), with even more available.

6

7 **Violation 2: Defendants letter failed to provide other requisite portions**
 8 **of the notice under 15 U.S.C. § 1692(g).**

9 Defendants' April 4, 2011 includes a defective notice that includes:

10 This firm will assume the debt to be valid unless you dispute its validity,
 11 or any portion thereof, within thirty (30) days from the date of this letter.
 12 Upon notification in writing that the debt, or any portion thereof, are
 13 disputed within this thirty (30) day period, this firm will obtain
 14 verification of the debt and will mail a copy of the same to you.

15 Through this language, Defendants fail to satisfy the requirements set forth in
 16 both 15 U.S.C. § 1692g(a)(4) and § (a)(5).

17 **D. DEFENDANTS LETTER FAILS TO COMPORT WITH 15 U.S.C. § 1692g(a)(4)**

18 15 U.S.C. § 1692g(a)(4) requires a debt collector send a notice containing:

19 a statement that if the consumer notifies the debt collector in writing
 20 within the thirty-day period that the debt, or any portion thereof, is
 21 disputed, the debt collector will obtain verification of the debt **or a copy**
of a judgment against the consumer and a copy of such verification **or**
judgment will be mailed to the consumer by the debt collector;
 22 (emphasis added)

23 Defendant omits all references to a "judgment" in the language required by
 24 15 U.S.C. § 1692g(a)(4). In the Ninth Circuit, the impact of language alleged to
 25 violate section 1692g is judged under the "least sophisticated debtor" standard.
 26 *Baker v. G.C. Services Corp.*, 677 F.2d 775, 778 (9th Cir. 1982). *See also, Swanson*
 27 *v. Southern Or. Credit Serv.*, 869 F.2d 1222 (9th Cir. 1988). In this case a consumer,
 28 is received a letter from a law firm regarding an alleged debt. The consumer's right
 to know if a judgment is already obtained and to be provided a copy of said

1 judgment is both necessary and relevant. Purposefully omitting the portion of
 2 1692g(a)(4) that gives the consumer the right to a copy of any possible judgments
 3 concerning the alleged debt is a clear violation of the FDCPA.

4 In construing the FDCPA the court is obliged to give effect, if possible, to
 5 every word Congress used. *See Baker v. G.C. Services Corp.*, 677 F.2d 775, 778
 6 (9th Cir. 1982) *citing Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Further, as
 7 the Ninth Circuit has noted:

8 because the FDCPA is a remedial statute aimed at curbing what
 9 Congress considered to be an industry-wide pattern of and
 10 propensity towards abusing debtors, it is logical for debt
 11 collectors--repeat players likely to be acquainted with the legal
 12 standards governing their industry--to bear the brunt of the risk.
 13 [FN] As we have oft repeated, it does not seem "unfair to
 14 require that one who deliberately goes perilously close to an
 15 area of proscribed conduct shall take the risk that he may cross
 16 the line." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 393, 85
 17 S. Ct. 1035, 13 L. Ed. 2d 904 (1965); see also [*Swanson v.*
 18 *Southern Or. Credit Serv.*, 869 F.2d 1222 (9th Cir. Or. 1988)],
 19 869 F.2d at 1228.

20 *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162,
 21 1171-1172 (9th Cir. 2006).

22 **E. DEFENDANTS LETTER FAILS TO COMPORT WITH 15 U.S.C. § 1692g(a)(5)**

23 Defendant omits another key right or notice afforded to consumers with
 24 regard to 15 U.S.C. § 1692g(a)(5), which requires a debt collector to send a notice
 25 containing:

26 a statement that, upon the consumer's written request within the thirty-day
 27 period, the debt collector will provide the consumer with the name and
 28 address of the original creditor, if different from the current creditor.

29 The notice required by 15 U.S.C. § 1692g(a)(5) is completely missing from
 30 Defendants' April 4, 2011 letter. The FDCPA is strict liability. *Reichert v. National*
 31 *Credit Systems, Inc.* 531 F.3d 1002, 1004 (9th Cir, 2008) ("After the district court
 32 ruling, and after this appeal was briefed, our court decided [*Clark v. Capital Credit*

1 & *Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006)], which made clear that the
 2 FDCPA is a strict liability statute in that a plaintiff need not prove an error was
 3 intentional.”) Defendants’ omission of of the notice required by 15 U.S.C. § 1692g
 4 (a)(5) is a clear violation of the FDCPA.

5 **F. DEFENDANTS VIOLATIONS CANNOT BE CURED, NONETHELESS**
 6 **DEFENDANT FAILED TO PROPERLY CURE THE VIOLATIONS IN QUESTION.**

7 It is first worth noting that the FDCPA provides no vehicle to forgive a debt
 8 collector that “cures” a violation of the FDCPA. However, the fact that Defendants
 9 now argue they cured their violations demonstrates that even Defendants recognize
 10 they have violated the FDCPA.

11 Further, the “cure” clause of Cal. Civ. Code § 1788.30(d) that Defendants
 12 look to is inapplicable to the FDCPA violations engaged in by Defendants,
 13 including the violations cited above under 15 U.S.C. § 1692g. This is because,
 14 first, section 1788.30(d) applies only to “this title,” which is the Rosenthal Act.
 15 Secondly, the FDCPA provides that this “cure” clause found in the Rosenthal Act is
 16 expressly preempted by the FDCPA.

17 This subchapter does not annul, alter, or affect, or exempt any person
 18 subject to the provisions of this subchapter from complying with the laws
 19 of any State with respect to debt collection practices, **except to the extent**
20 that those laws are inconsistent with any provision of this subchapter,
 21 and then only to the extent of the inconsistency. For purposes of this
 22 section, a State law is not inconsistent with this subchapter if the
 23 protection such law affords any consumer is greater than the protection
 24 provided by this subchapter.

25 15 U.S.C. § 1692n. The “cure” clause found in Cal. Civ. Code § 1788.30(d) is
 26 clearly inconsistent with the FDCPA, which provides “greater protection.”
 27 Consequently, any claimed cure here is inapplicable.

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1 Further, in drafting Cal. Civ. Code § 1788.30(d), the California legislature
 2 clearly anticipated that some violations of the Rosenthal Act are not able to be
 3 cured, because it used the phase “which is able to be cured.” Cal. Civ. Code §
 4 1788.30(d).

5 Defendants’ Rosenthal Act violations cannot be cured either, and have not
 6 been cured even today. Defendant incorrectly states that Cal. Civ. § 1788.30(d)
 7 “provides the ability for a debt collector to cure *any* alleged violation under the
 8 Rosenthal Act within a certain time period.”¹⁵ (Italics provided for emphasis). This
 9 is incorrect. The California legislature expressly provided only that “if within 15
 10 days either after discovering a violation **which is able to be cured...**” (emphasis
 11 added), which indicates the legislature carefully considered this issue and choose
 12 not to allow a debt collector more time to provide the 5 day notice. The violations
 13 in question here, mainly Defendant’s failure to include the proper notice and their
 14 requirement for action before Plaintiff’s dispute period was complete, and cannot
 15 be cured. 15 U.S.C. § 1692(g) requires the notice to be sent within five business
 16 days of the initial communication with the debtor. Defendant cannot meet this
 17 requirement. The five day period allotted to Defendant has and Defendant cannot
 18 go back in time to provide the notice within the mandated time frame. Further,
 19 even Defendants attempt to cure their violation does not do so.

20 Nonetheless, even if Defendant was able to cure the violation alleged here,
 21 Defendant failed to properly do so. California Civil Code section 1788.30(d)
 22 specifically requires Defendant to notify “the debtor of the violation.” In
 23 Defendant’s so-called “Curative Letter” there was no such notification. To escape
 24 liability Defendant is required to point out the violations made and then make
 25 whatever adjustments or corrections that are necessary to cure the violation with
 26 respect to the debtor. Defendant failed to take these required steps and therefore
 27 failed to properly cure the violations in question.

28 ¹⁵ Docket No. 7: Defendant’s Motion to Dismiss, Page 6 lines 11-12.

1 **V. CONCLUSION**

2 Defendant included extrinsic evidence in their motion to dismiss; therefore,
3 the Court should convert Defendants' motion to dismiss into a partial motion for
4 summary judgment. According to Ninth Circuit case law, Cabrillo is vicariously
5 liable for their attorneys Solomon's violations of the FDCPA. Defendants violated
6 the FDCPA several times in their April 4, 2011 letter, which they cannot and did not
7 properly cure. In conclusion, judgment should be found in favor of Plaintiff.

8
9
10 Respectfully submitted,

Hyde & Swigart

11 Date: November 30, 2011

12 By: /s/ David J. McGlothlin

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14 Attorneys for Plaintiff

HYDE & SWIGART
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